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IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1980
No. ____

Sunnyside Valley Irrigation District,

Petitioner,

v.

Kittitas Reclamation District; United States of America; Roza Irrigation District; Union Gap Irrigation District; and Yakima Valley Canal Company;

Respondents.

RESPONDENT ROZA IRRIGATION DISTRICT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Petitioner Sunnyside Valley Irrigation District (hereafter "SVID") states that Permit No. 97 was issued for the construction of the Cle Elum Reservoir and that Permit No. 97 totalled 535,000 acre feet which included the 100,000 acre feet of dead storage which is the subject of the suit. (Petition, page 7) The contention concerning Permit No. 97 was advanced specifically for the first time in the SVID's petition for rehearing in the court below. However, reference to Permit No. 97 alone is misleading. Respondent Roza Irrigation District asks this Court to take judicial notice of a Bureau of Reclamation publication "C.R. Lentz Review Yakima Project Water Rights and Related Data", published in 1974. At page 74, that report states:

> "e. Cle Elum Reservoir. Application No. 3210 and Permit No. 97 for 535,000 ac. ft., initial application filed October 16, 1930. Although original Permit No. 97 gives the amount of water to be stored as 535,000 ac.ft., the active capacity is 436,900 ac.ft. (This notation is indicated on Proof of Appropriation,

dated December 29, 1951.) Certificate No. 8646 issued December 13, 1962, for 437,000 ac.ft."

ARGUMENT

I.

THE UNITED STATES HAS NEVER APPROPRIATED THE 100,000 ACRE FEET OF LAKE CLE ELUM DEAD STORAGE.

In 1931, the United States was issued Permit No. 97 for 535,000 acre feet of storage in Lake Cle Elum, which would include the 100,000 acre feet of pre-existing dead storage. However, the project as finally constructed by the United States did not enable it to use the 100,000 acre feet of dead storage and the certificate of water right ultimately issued by the State of Washington was for 437,000 acre feet, the active storage capacity (Lentz, supra). Therefore, the only water right ever acquired by the United States in Lake Cle Elum was the 437,000 acre feet of active storage.

The Reclamation Act directs the Secretary of the Interior to proceed in conformance with State laws in acquiring water rights for the various projects which he constructed. Section 8 of the Reclamation Act of 1902, (43 U.S.C. §§ 372 and 383, provides, in pertinent part:

> "Nothing in this act shall be construed as affecting or intended to

affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws, . . . Provided, That the right to the use of water acquired under the provisions of this act shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of the right."

The most recent expression of this Court on acquisition of reclamation project water rights confirms that the United States must comply with state law. In the case of California vs. United States, 438 U.S. 645, 57 L.Ed.2d 1018, 98 S.Ct. 2985 (1978), this Court held that a state can impose conditions on the appropriation of water for a reclamation project, not inconsistent with congressional directives. In doing so, the Court made it clear that state law controls the appropriation of water for federal reclamation projects:

"The legislative history of the Reclamation Act of 1902 makes it abundantly clear that Congress intended to defer to the substance, as

well as the form, of state water law." (98 S.Ct. at 3001)

Therefore, it is clear that the United States did not have any right to the use of the 100,000 acre feet of Lake Cle Elum dead storage in 1945, since the final certificate of water right did not include it. In addition, the water had not then, and has not now, been applied to a beneficial use.

If there were any doubts remaining concerning the existence of a "project water right" in the 100,000 acre feet of dead storage under Permit No. 97, the Bureau of Reclamation laid them to rest when it applied for a permit in 1977 to use the 100,000 acre feet by pumping. (Petition, page 13) If the United States already had a water right for the 100,000 acre feet, it would have been a totally useless act for it to apply again for the same right.

It is clear that not only did the United States have neither the ability to deliver the 100,000 acre feet of dead storage in 1945, nor the obligation to deliver the dead storage, it had no right under Washington law to the use of the

100,000 acre feet of water. Therefore, the United States was lacking in all aspects of what it needed to deliver the water: ability, obligation and right.

The fact that the certificate of water right ultimately issued by the State of Washington excluded the 100,000 acre feet appears conclusive on the question of whether or not the 100,000 acre feet of dead storage was ever applied to a beneficial use by the United States so as to perfect a water right. However, independent of the action of the State of Washington, dead storage is not a beneficial use of water so as to prevent use of the dead storage for beneficial use by others. In the case of Ickes vs. Fox, 85 F.2d 294, (D.C. Cir. 1936), cited and relied on by Petitioner, the Court said:

> "It is settled irrigation law that mere diversion and storage of water does not constitute an appropriation. Before there can be an appropriation the water must be applied to a beneficial use." (85 F.2d at 298)

If diversion and storage is not enough, non-diversion and non-storage of a natural lake would also be insufficient for an agricultural water right.

The courts of the western states have decided analagous questions relating to what might be called "passive" uses of water. For example, in the case of State Ex. Rel. Reynolds vs. Miranda, 493 P.2d 409 (N.M. 1972) the question was whether grazing of livestock or harvesting of grass on areas overflowed during the flood season constituted such a diversion or application to a beneficial use as to give the landowner a water right. The specific issue was whether a man-made diversion was required. The court held that "man-made diversion, together with intent to apply water to beneficial use and natural application of the water to beneficial use, is necessary to claim water rights by appropriation in New Mexico for agricultural purposes." (493 P.2d 409 at 411) To the same effect is the case of Walsh vs. Wallace, 67 Pac. 914 (Nev. 1902).

In the case of Schodde vs. Twin Falls Land and Water Company, 24 U.S. 107, this Court affirmed a lower court decision which held that an appropriator could not claim to have beneficially used the flow of the river where the river was used to turn water wheels to elevate the appropriator's

water to his land. In the case of Warner Valley Stock Company vs. Lynch, 336 P.2d 884 (Ore. 1959) the question stated by the court was:

> "Do these objectors have the right to insist that Hart Lake be fed with waters none of which, below the point of overflow, will be used for application upon the land in Warner Valley, but will serve only to raise the surface of the lake to a point of overflow?"

The court there held that the overflow method of appropriation was not protectible, and that the irrigators had no right to force continued delivery of water to Hart Lake so that it would overflow onto their lands.

In the case of Handy Ditch Co. vs. Greeley and Loveland Irrigation Co., 280 Pac. 481 (1929), the Supreme Court of Colorado rejected a claim by an appropriator of a natural flow right that he could "temporarily impound" his natural flow right. The court said:

> "(A)ll water impounded in any storage reservoir is to be put there only temporarily; otherwise, its capture from the stream must of necessity defeat the purpose of the law of beneficial user. . . The right to the use of water, whether by direct flow, or through storage reservoirs, is a

usufructuary right, and it would be absurd to suppose that water could be used for irrigation by permanently storing it in a reservoir." (280 Pac. at 481, 482)

Under the general law found in the arid western states, the dead storage water of Lake Cle Elum has never been applied to a beneficial use and cannot be said to have been previously appropriated to the benefit of the Yakima Project or SVID.

II.

THE DEAD STORAGE WATER IN LAKE CLE ELUM WAS NOT INCLUDED IN THE WATER SUBJECT TO THE OPERATION OF THE 1945 DECREE.

The judgment entered in the District Court in 1945 by its terms excluded any delivery of the 100,000 acre feet dead storage in Lake Cle Elum. As quoted at pages 9 to 11 of the Petition, the judgment provides, in pertinent part, relative to the obligations of the United States:

"2. The obligations of the United States to deliver from the natural flow of the Yakima River, and its tributaries, from storage in its various reservoirs on the Yakima watershed, and from other sources, . . . are as set forth hereafter in this judgment.

> "20. This judgment shall constitute a final determination of the obligation of the United States to deliver water from the Yakima River, and its tributaries, from storage from its various reservoirs in the Yakima watershed and from other sources to the parties to this judgment . . . Each of the parties to this cause, their grantees, successors and assigns are by this judgment forever enjoined and restrained from asserting any claim to, or interfering with any of the rights to the use or the delivery of those quantities of water which are recognized in this judgment."

The short answer then, to the contentions of SVID, is that only the United States' obligation to <u>deliver</u> water was set forth in the 1945 decree. There was no obligation in the Decree to <u>acquire</u> new water rights for delivery. Also, the parties were restrained and enjoined from interfering with or asserting claims to rights recognized in the decree. The United States could have no obligation to deliver water from the dead storage in Lake Cle Elum, since it was not physically available to the United States in 1945, or since, and one cannot assume that the lower court was ordering the United States to do something which it

could not do. Thence, the right to delivery of water from the dead storage in Lake Cle Elum could not have been recognized in the decree, and the injunction language could not apply to the Lake Cle Elum dead storage water, since that right was not recognized by the decree.

III.

THERE IS NO CONFLICT BETWEEN THE DECISION IN THE COURTS BELOW AND ANY OTHER CIRCUIT COURT DECISION.

SVID contends that there is a conflict between the decisions below and the Ickes vs. Fox, series of cases (85 F.2d 294, D.C. Cir. 1936; 300 U.S. 82, 1937; Fox vs. Ickes, 137 F.2d 30, D.C. Cir. 1943).

The Ickes vs. Fox decision can perhaps be categorized as somewhat of an aberration, but even accepting the cases as they stand, a much different question was involved in the Ickes vs. Fox cases, and those decisions were all in place prior to the 1945 judgment in the District Court upon which SVID bases its claims. In the Ickes vs. Fox, supra, situation, Fox and others had water rights through the Washington Irrigation

Company before the United States purchased certain water rights and systems from that company. Plaintiffs then executed contracts with the United States for certain water rights on payment of certain sums which they had paid. The amount of water to be delivered was not specifically stated, but was to be beneficially used. For a number of years the U.S. delivered well over 4 acre feet per acre, apparently agreeing that the water delivered was being applied to a beneficial use.

In the 1930's, due to a dry cycle, and the addition of more acres to the Yakima project, the United States desired to construct more storage. Lake Cle Elum was selected as a site, but the U.S. found that the project would not pay for itself unless $1 million could be raised. The Secretary of the Interior then proposed to restrict deliveries to the plaintiffs and others to a maximum amount of 3 acre feet per acre unless the plaintiffs agreed to rent additional water, thus covering the deficiency in the construction cost repayment.

The result of the Ickes vs. Fox, supra, cases was that plaintiffs did not have to pay for the additional water above 3 acre feet per acre. The basis of the decisions apparently is that the water rights had previously been fixed at a greater amount by the application of the larger amount of water to a beneficial use. The United States, as the diverter, storer and carrier of the water, had no water right itself, and could not unilaterally restrict the use of water by plaintiffs.

Those cases do not stand for the proposition advanced by SVID that it already had a right to the delivery of water from Lake Cle Elum. If the United States had not constructed Lake Cle Elum, obviously SVID could not have forced its construction. As pointed out in Fox vs. Ickes, 137 F.2d 30, at 33, the Secretary of the Interior "is not obligated to furnish any more water than is available." If the Secretary had constructed Lake Cle Elum Dam and Reservoir and contracted to sell all the stored waters to others, SVID could not complain, since it was then no worse off than it was

without the reservoir. As the Fox vs. Ickes case points out, in time of shortage, distribution of water would be by priority under the laws of the State of Washington. (137 F.2d. 30 at 33) The basic case herein had already been filed in the District Court for the purpose of fixing those priorities. (137 F.2d 30, note 11)

The Ickes vs. Fox cases did not define any rights of SVID as proratable storage or nonproratable natural flow and certainly did not give SVID any rights in unused and usable dead storage in Lake Cle Elum. Therefore, no conflict exists between the decisions below, and the Ickes vs. Fox cases.

IV.

SVID'S POSITION, IF ADOPTED, WOULD BLOCK ALL FURTHER DEVELOPMENT IN THE YAKIMA PROJECT.

The basic Reclamation Act, in Section 4, required the Secretary to recover the costs of the project from the entrymen:

> "The said charges shall be determined with a view of returning to the reclamation fund the estimated cost of construction of the project, and shall be apportioned equitably, . . ." (43 U.S.C. §§ 419, 461)

The same general policy is found throughout the reclamation law, including the Warren Act, (43 U.S.C. 523).

SVID relies on the Ickes vs. Fox cases to avoid imposition of any construction costs for further water supply development. It then asserts that any such increased water supply must be made available to fill SVID's claimed rights, even though SVID will not pay for any of the costs.

Since the Secretary must recover the cost of constructing new irrigation water supply facilities from project water-users, he has to sign contracts with those users. If SVID is correct, then the Secretary cannot contract to deliver the 100,000 acre feet of dead storage water to Roza even if Roza were willing to pay for it. There is no reason for Roza to pay for the cost of the project, since the water developed thereby cannot be committed to Roza.

The effect of a ruling in SVID's favor would be to eliminate any possibility of constructing new storage facilities in the Yakima project to alleviate water shortages. Such a construction of

the 1945 judgment would be unreasonable, and contrary to logic and the whole course of the reclamation movement in the United States.

CONCLUSION

Respondent Roza Irrigation District respectfully requests that SVID's Petition for Writ of Certiorari be denied.

DATED this ____ day of November, 1980.

Respectfully submitted,

NELSON, ROSHOLT, ROBERTSON, TOLMAN & TUCKER

By: _____
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